SUPREME COURT, U. S.

FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 974

[redacted],

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

[redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

ELDON WAYNE McKUIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Eldon Wayne McKuin, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on October 16, 1970.

OPINION BELOW

The opinion of the court of appeals is not yet reported and is printed as Appendix, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on October 16, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial misjoinder of offenses and defendants under Rule 8, F. R. Crim. P., where each count of a sixteen counts indictment charged the same scheme but the evidence showed a multiplicity of schemes.

2. Whether petitioner was so prejudiced by such joinder of offenses and defendants in a trial together that the trial court abused its discretion under Rule 14, F. R. Crim. P., in denying petitioner a severance or other relief required by justice.

3. Whether Petitioner was deprived of rights of confrontation under the 6th Amendment by the granting of testimonial privilege against self incrimination to an identifying witness, who identified this Petitioner on direct examination, even though the jury was later admonished to disregard same, upon motion of co-defendant.

4. Prosecutorial misconduct could not be effectively dispelled by a court's striking of testimony of identification witness, and later instruction for jury to disregard, when said witness was again presented before the jury three days later.

5. Jury instructions to disregard evidence not relevant to the named defendants, in a case joining three (3) defendants and six (6) co-conspirators, were ineffectual to dispell poisonous testimony of illegalities of the six non-defendants, when the majority of the testimony adduced, and majority of the Counts (Counts 4, 5, 6, 7, 8, 9, 10,

11, 13, 14 and 16), pertained to activities of the six non-defendants, the plethora of evidence not germane to Petitioner constituted a deprivation of due process under the 5th Amendment, and induced a finding of "guilt by association" by the jury.

STATUTES AND RULES INVOLVED

18 U. S. C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose, or loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheem or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 8 of the Rules of Criminal Procedure provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on

the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

Constitution, United States, Amendment V.

Constitution, United States, Amendment VI.

Each count of the sixteen-count indictment charged one single, identical scheme to defraud, with separate mailings. The petitioner, Walter Jerrold Frey, and Mrs. McKuin were named as defendants in each count of the indictment. Still different and separate activities were shown by the evidence, and indeed by the indictment itself.

Prior to trial petitioner moved for a severance, on the ground among others, that "there is a misjoinder of defendants and offenses in the indictment." Also he moved to dismiss the indictment alleging, among other grounds, that "the indictment, and each count thereof, charges a multiplicity of alleged schemes, does not charge one single scheme to defraud, and consequently is duplicitous." These motions were overruled.

After trial petitioner's motion for a new trial, which was also overruled, contained the same grounds in more detail.

The evidence adduced may be summarized briefly as follows:

Co-defendant Frey operated the Jerry Frey Marine Sales Co. at Alton, Illinois, and Petitioner operated a telephone answering service company at 225 South Meramec, Clayton, Missouri. Frey's company was placed into receivership in October 1966 (Tr. 368).

The earliest incident, related in the evidence concerned a loan, purportedly secured by a boat, in the name of William A. Hoover. This loan and a subsequent claim made on insurance on the purported boat were the mailings alleged in Counts Two and Twelve of the indictment.

On March 1, 1966, Mr. William A. Hoover purchased a boat from the Jerry Frey Marine Sales Co. Frey was financing boats held in stock through the First National Bank of Alton, Illinois. At the same time that Hoover purchased his boat, Frey caused a second loan to be made with the First National Bank of Alton, in Hoover's name. This loan was identical to the real Hoover loan except that another serial number was used for the boat. Frey made the payments on the loan, totaling seven payments, until he went out of business on October 31, 1966 (Tr. 253-263, 364-369).

On July 6, 1966, insurance was taken out on this claimed boat, using Frey's home address. On September 27, 1966, someone claiming to be Hoover called the State Farm Insurance Agency and reported that the boat had been sunk, making an oral claim for insurance. In January 1967, the State Farm Insurance Company rejected the claim which was not pursued and refunded the premium on the insurance. The refund check in the amount $81.34 was sent to Hoover at Frey's home address (Tr. 178-186). The registration card accepting this check was signed "Jerry Frey," but the postal authorities could not

identify Frey as the person who signed the registration receipt (Tr. 352-357). The check was negotiated in the name of William A. Hoover. The Court acquitted the petitioner on these counts.

The second incident, being the mailing in Count 1, involved a loan on a boat in the name of Frederick Clemens in April 1966. One Charles Ross sold a boat to Frederick Clemens with the Jerry Frey Marine Sales Company acting as broker. Frey called credit information to the lending institution to obtain a loan in the amount of $4,000.00 for Frederick Clemens to finance the purchase, with his employment being one of the companies whose telephone was answered at the McKuin Answering Service. Government witness, Walter Younge, testified that he brought one Fred Clemens in for this sale (Tr. 166-7). Younge received two-thirds of a $1,000.00 commission for doing so, with petitioner retaining $350.00 (Tr. 615-618, 166-167). Mr. Fred Clemens, although admittedly a friend and close resident of Walter Younge, testified that he did not purchase the boat (Tr. 266-273). Frey was also instrumental in supplying a survey report on the boat to the lending institution. The serial number on the boat shown in the survey report was not one used by the manufacturing company, and Mr. Sherlock, Frey's employee, whose name was signed to the report, denied signing it (Tr. 221-232). The check issued by the lending institution to Fred Clemens was negotiated at Frey's place of business, the records showing that $3,000.00 went to Charles Ross, $650.00 to Walter Younge and $350.00 to the company (Tr. 205-233, 615-618).

The majority of the evidence adduced related to credit cards, and purchases made thereby, which were issued in the name of Kenneth Pohlmann (The Mailings in Counts 4, 6, 8, 9, 13, 14 and 16) and in the name of Jess C. Cummings (Counts 5, 7, 10 and 11).

The evidence disclosed that in May 1965, one Kenneth Pohlmann bought a boat from the Jerry Frey Marine Sales Company. In January 1966, Mr. Pohlmann moved to Ohio (Tr. 69-101). In late June 1966, one Sarah Jean Daniels, a 17 year-old girl, met one James Rosenthal. Immediately thereafter she moved into an apartment at 4255a Geraldine occupied by James Rosenthal and James Robinson. She lived at this apartment until about August 11, 1966, when she moved to another apartment occupied by the same people approximately two blocks away at 10087 Executive Drive, where she lived for about a week. She testified that she overheard conversations among Robinson, Rosenthal, Defendant Frey and Defendant McKuin concerning credit cards and concerning Kenneth Pohlmann, Jess C. Cummings and Salvatore Levintino.

The Daniels girl also testified that on August 1, 1966, she went with Defendant Frey to rent an apartment at 965 Daulphin Street in the name of Kenneth Pohlmann and his wife, and that petitioner signed the name Kenneth Pohlmann to the lease and she signed the name of Mrs. Pohlmann (Tr. 24-68).

On June 30, 1966, a false application was made for a Mobil Oil Credit Card and on the same day a false application was made for a Central Hardware Credit Card both in the name of Kenneth Pohlmann, the address of Petitioner at 12318 Gravois Avenue was used on these applications. Employment and credit references were furnished as companies and telephone numbers answered at the McKuin Answering Service (Tr. 233-252). On July 25, 1966, a similar application was made for a Shell Credit Card; on July 28, 1966, a similar application was made for a Carte Blanche Credit Card; and on September 9, 1966, a similar application was made for a Famous-Barr Credit Card all in the name of Kenneth Pohlmann and using the 965 Daulphin Street address.

The handwriting expert testified (based solely upon a comparison of the name "Kenneth Pohlmann" signed to the lease to the 965 Daulphin Street apartment, and upon printing) that all these applications were in the printing and signed in the handwriting of the Defendant Frey (Tr. 496-516, 538-579). Although extensive purchases were made on these credit cards (Tr. 274, 283, 316, 371, 372, 418, 420; Exhs. 75-86, 53-62, 33-47), the handwriting expert (again based solely on printing and the above-mentioned written name) testified that Frey made only three purchases of oil on the Mobil Oil card, two purchases at Central Hardware and one purchase at Famous-Barr. In other words, these were the only purchases which the handwriting expert stated were made by Frey on any of the credit cards issued in the names of Kenneth Pohlmann or Jess C. Cummings (Tr. 577-579).

On September 18, 1966, the Petitioner and his wife purchased a boat at the Lake of the Ozarks in the name and credit of Kenneth Pohlmann. This transaction, about which there was much testimony, was the subject matter of Count 15. This Count 15 was dismissed by the Government, just prior to the case going to the jury, with respect to Defendant Frey (Tr. 90-95, 101-121, 392-3, 398-403, 421-425). The evidence also showed that Petitioner in a similar manner purchased and financed a car (Tr. 375-408).

On September 21, 1966, a change of address card was filed with the Post Office system changing Mr. Kenneth Pohlmann's address from 965 Daulphin Street to 12318 Gravois Avenue, which was the address of the Petitioner. On October 9, 1966, a change of address card was filed with the Post Office system changing the address of Kenneth Pohlmann from 12318 Gravois to 225 Meramec Street, which was the address of a telephone answering system operated by the Petitioner. The handwriting expert found these to be in the handwriting of the Petitioner.

Petitioner was found guilty of thirteen counts, most relating to these credit cards, and of the two counts concerning the changes of address.

In the applications for these credit cards, Mr. Kenneth Pohlmann's place of employment and certain credit references were given as companies whose telephones were answered by Petitioner's answering service which was located at 225 Meramec in Clayton, Missouri.

The only evidence which associated petitioner with these credit cards was the use of Petitioner's address, the use of credit references of companies serviced by his answering service, and testimony of a general meeting of parties by witness Sarah Jean Daniels.

On November 9, 1963, the Jerry Frey Marine Sales Company sold a boat to Jess C. Cummings. Mr. Cummings lived at the Lake of the Ozarks in central Missouri (Tr. 122-145). On July 28, 1966, a false application was made for a Mobil Oil Credit Card in the name of Jess C. Cummings giving his address as 10087 Executive Drive, one of the apartments where Robinson and Rosenthal lived, with employment and credit references of companies answered at the McKuin Answering Service (Tr. 233-252). On August 3, 1966, similar applications were made for a Sears Credit Card and a Central Hardware Credit Card in the name of Jess C. Cummings which applications were mailed from Alton, Illinois. On August 10, 1966, a similar application was made for a Scruggs Credit Card in the name of Jess C. Cummings giving the address as 10087 Executive Drive. Again employment and credit references were supplied which were numbers answered at the McKuin Answering Service.

The handwriting expert testified that these applications were in the handwriting of Defendant Frey but he based his conclusion solely on printing and upon the letter "J"

which was contained both in the name Jess C. Cummings and in the signature of Defendant Frey.

During the period from August 14, 1966 to August 28, 1966, Defendant Frey was in the hospital as a result of a boating accident (Tr. 342, 620-621, 634-639) and was incapacitated for a month or so and at the time the purchases attributed to him by the handwriting expert were made.

Of the four counts relating to credit cards in the name of Jess C. Cummings, the Defendant Frey was convicted on two counts, being counts five and seven, for Mobil Oil Credit Card and Scruggs Credit Card, and acquitted on two counts, being Counts 10 and 11, for credit cards at Central Hardware and at Sears. Petitioner was convicted of all.

The last incident that was referred to in the evidence, being Count 3, concerned a false loan purportedly obtained by Salvatore Levintino on August 10, 1966, for $4,359.60. At that time Salvatore Levintino purportedly purchased a boat from one Robert J. Cummings. A loan was obtained from the lending institution in Mr. Levintino's name. The note and mortgage for this loan gave Salvatore Levintino's address as 10087 Executive Drive (Tr. 145-158, 188-205). Government witness Walter Younge testified that Defendant Frey signed Salvatore Levintino's name to the note and mortgage and that he signed the name of Mrs. Levintino (Tr. 159-163). A check in the amount of $3,600.00 was issued in the name of Salvatore Levintino, which was negotiated at the Jerry Frey Marine Sales Company in exchange for a boat purported sold to one Robert J. Cummings. An employee at the Jerry Frey Marine Sales Company testified that he handled this sale but no Robert J. Cummings was ever located (Tr. 358-359, 612-615). Two payments were made on this loan by money orders in the name of Salvatore Levinto. Mr. Vollertsen testified that the same person who wrote "Sal-

vatore Levintino" on the note and mortgage also wrote that name on the money orders. A person by the name of Robert J. Cummings could not be located at or near the address given for him (Tr. 358-359). Mr. Salvatore Levintino testified that he did not make this loan and that he did not sign the note and mortgage. He also testified that immediately prior to August 1, 1966, he had occupied the apartment at 965 Daulphin which had been rented and used as an address for Kenneth Pohlmann (Tr. 145-158). Sarah Jean Daniels testified that mail and phone calls were received at 4255a Geraldine for and in the name of Kenneth Pohlmann and that mail and phone calls were received at 10087 Executive Drive for and in the name of Jess C. Cummings and Salvatore Levintino (Tr. 30). Petitioner was convicted on this count, also.

REASONS FOR GRANTING THE WRIT

1. Important questions of general applicability affecting the administration of criminal justice in the Federal Courts, and the application of Rules 8 and 14 of the Federal Rules of Criminal Procedure, are here presented. Separate and distinct conspiracies, even though they have a common link and like object, cannot be joined together and prosecuted as a single conspiracy. **Kotteakos v. United States**, 328 U. S. 750; **Canella v. United States**, 157 F. 2d 470 (C. A. 9); **United States v. Goss**, 329 F. 2d 180 (C. A. 4); **Rocha v. United States**, 288 F. 2d 545 (C. A. 9); **United States v. Russano**, 257 F. 2d 712 (C. A. 2); **Dailey v. United States**, 282 F. 2d 818 (C. A. 9).

The scheme was charged in the first Count of the indictment and incorporated in the other Counts. It is apparent from a reading of the indictment and the transcript that the Government grouped together a number of independent transactions, and merely designated them as one single scheme. The courts have consistently ruled

that prosecution of a number of separate ventures as one scheme in one Count of an indictment is not permissible. **Kotteakos v. U. S.**, 328 U. S. 750; **United States v. Wertman**, 7 Cir., 326 F. 2d 717; **United States v. Russano**, 2 Cir., 257 F. 2d 712; **Rocha v. United States**, 9 Cir., 288 F. 2d 545; **Canella v. United States**, 9 Cir., 157 F. 2d 470; **Daily v. United States**, 9 Cir., 282 F. 2d 818.

A single scheme or conspiracy may exist even though not all the conspirators participated in all parts of the conspiracy, particularly when it extends over a long period of time. **Blumenthal v. United States**, 332 U. S. 539. This type of conspiracy has been referred to as a chain conspiracy. **United States v. Borelli**, 336 F. 2d 376, 383 (C. A. 2) certiorari denied 379 U. S. 960. But the fact that some objects of distinct activities are similar, or even identical, is not enough to make such activities all a part of one single scheme. Each such activity must be a part of one "single, over-all, comprehensive plan", design or agreement. **Blumenthal v. United States**, supra, at 558. The three activities shown by the evidence here were not links of one chain or conspiratorial plan, but separate and distingt plans or schemes. First, there were the loans on boats, apparently to bolster Defendant Frey's failing business, with which Petitioner had no concern. Second, there was the credit card scheme. And, third, there were the purchases by Petitioner of a boat, of which Defendant Frey had no concern. The Government's own evidence affirmatively established that there was no overriding conscious design or plan which tied the three ventures together into one scheme.

For a long time, since **Blumenthal** was decided in 1947, the Federal Courts have been struggling to solve the problems of mass trials, and consequently joinder, by undertaking to fit each case into "wheel" or "chain" activities as illustrated by **Kotteakos and Blumenthal**, respectively.

It has been said that such distinction "is not a substitute for close thinking in particular cases". **Wright, I Federal Practice and Procedure**, 332. Nevertheless, the activities proved were separate and distinct and the prejudice to petitioner of the joint trial is clear.

Because the prejudice to petitioner of the joint trial is so clear in the instant case (cf. **Berger v. United States**, 295 U. S. 78), and the activities so distinct and dissimilar, this case is, we submit, an excellent vehicle for this Court to clarify the law on this important subject in the administration of criminal justice.

2. It has been said that "trials involving large numbers of separate offenses are not the favorites of the law". **Daly v. United States**, 342 F. 2d 932, 933 (C. A. D. C.), certiorari denied 382 U. S. 853. Though many of the States have practiced this principle, requiring a separate trial for each offense and each defendant (See R. S. Mo. 1959, Section 545.880), we strongly urge that this principle has not been practiced much in the Federal Courts. But we submit that this distinction in Federal and State law causes an accused to receive a fairer trial in the State Courts than in Federal Courts. This Court, while more recently engaged in correcting other State and Federal abuses in criminal justice, has not been wholly indifferent to this injustice in Federal Criminal Procedure. During the redrafting of the Federal Rules of Criminal Procedure, this Court asked the Advisory Committee whether any study of the abuse of indictments drawn with an excessive number of counts had been made. Orfield, **Relief From Prejudicial Joinder in Federal Criminal Cases**, 36 Notre Dame Law 276, 766.

The new Rule 14, Federal Rules of Criminal Procedure, which became effective July 1, 1966, liberalized the rule on severance. It provides, for the first time for the Court to make *in-camera* inspection of statements and confes-

sions of defendants to aid in ruling on a motion for severance. The note to the rule states that "recent Fifth Circuit cases have found sufficient prejudice involved to make denial of a motion for severance reversible error. See **Schaffer v. United States**, 221 F. 2d 17 (5th Cir., 1955); **Barton v. United States**, 263 F. 2d 894 (5th Cir. 1959)." So this Court has found that a confession of a co-defendant was prejudicial, and its use required severance. **Bruton v. United States**, 88 S. Ct. 1620. More frequently now, the Courts are ruling that the failure to grant a severance is an abuse of the trial Court's discretion. **United States v. Kelly**, 2 Cir., 349 F. 2d 720, 758; **DeLuna v. United States**, 5 Cir., 308 F. 2d 140; **United States v. Echeles**, 7 Cir., 352 F. 2d 892. See **United States v. Talenfeld**, 190 F. Supp. 108, 110; **Haggard v. United States**, 369 F. 2d 968, 973-4 (C. A. 8).

Certainly this is an appropriate case for this Court to delineate the duties of a trial Court pursuant to Rule 14. For this Court has said that the trial Court should become "particularly sensitive" to prejudicial joinder. **Shaeffer v. United States**, 362 U. S. 511, 516.

3. The assertion of testimonial privilege in cross-examination was last examined by this Court in 1963, in **Namet v. U. S.**, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. With two judges dissenting, this Court determined same on the basis of (1) prosecutorial misconduct and (2) the addition of critical weight to the prosecution case. This Court has not ruled on the 6th Amendment right of a defendant to fully cross-examine when a witness has waived his rights against self-incrimination, on direct testimony, and the Trial Court fails to compel answers to full interrogation. This decision, by the 8th Circuit, failed to expressly rule upon deprivation of Defendant McKnin's 6th Amendment rights to full confrontation, although discussing the two criteria set forth in **Namet v.**

U. S., supra, failed to rule upon testimonial waiver of witnesses' privilege against self incrimination and appears to be in conflict with the principles enunciated by the 5th Circuit, 1967, in **Fountain v. U. S.**, 384 F. 2d 624, cert. denied 390 U. S. 1005, 88 S. Ct. 1246, 20 L. Ed. 2d 105.

In **Namet v. U. S.**, 1963, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278, Justice Black and Justice Douglas dissented. Said decision was based upon the question of prosecutorial misconduct and this Court then found no planned or deliberate attempts by the Government to make unfair capital out of the witness' refusal to testify, especially when defense counsel had failed to object and acquiesced in the Court's procedure. Said decision was not based upon the defendant's Sixth Amendment rights of confrontation and cross-examination of the witness. This Court further found, 373 U. S. 189, that the testimonial privilege was only allowed in regard to a matter about which abundant other evidence was given, and that any inferences gained by the testimonial privilege would only provide cumulative support for an inference well established by the non-privileged portion of the witness' testimony.

The case at bar appears to be in conflict with the 1967 decision of **Fountain v. U. S.**, 384 F. 2d 624, cert. denied 390 U. S. 1005, 88 S. Ct. 1246, 20 L. Ed. 2d 105. Said decision more fully discussed the Fifth Amendment privilege of the witness, the waiver thereof, and the balance of same with the Sixth Amendment rights of the defendant to confrontation. In **Fountain** relief was denied to defendant upon a witness' assertion of testimonial privilege in cross-examination where there was no request to and no ruling by the Trial Judge, and the defendant had not advised the Court of the purpose of his inquiry. The ultimate inquiry is always whether the defendant has been deprived of his right to test the truth of the direct testimony. If testified on direct, testimonial privilege is not available

for the witness to conceal details, or fail to explain the direct testimony, on cross-examination. Only after sufficient latitude of cross-examination has been allowed by the Court to satisfy the Sixth Amendment requirement, may the Trial Judge limit cross-examination, in the interest of fair play. **Fountain v. U. S.**, 384 F. 2d 624, 628, C. A. 5, 1967; **United States v. Cardillo**, 316 F. 2d 606, 611, C. A. 2, cert. denied 375 U. S. 822, 84 S. Ct. 60, 11 L. Ed. 2d 55 (1963); **Rogers v. U. S.**, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); **Montgomery v. U. S.**, 203 F. 2d 887, C. A. 5 (1953).

In the cause herein, the witness Bishop testified (Tr. 377, 378) on direct examination that petitioner was the man who actually appeared before the witness and represented himself as a Mr. Jess Cummings in the purchase of an automobile. The name Jess Cummings was utilized, and was the basis of four (4) counts, for the use of fraudulent information in the procurement and purchases by credit cards. This was the main testimony which identified the petitioner as Jess Cummings. When the witness was further asked on direct examination as to whether he took the credit information (Tr. 382), his claim of testimonial privilege was sustained. On cross-examination (Tr. 389, 390), the witness Bishop was asked if he knew that a fictitious name was being used at the time this auto was being purchased and he refused to answer upon the basis of testimonial privilege. Thereafter, petitioner's counsel asked for a mistrial (Tr. 394). Upon the claim of the prosecutor that he had no advance knowledge of the witness' intention to assert his Fifth Amendment privilege, same was denied. Counsel for the other defendant who waived cross-examination, then asked (Tr. 396) that the jury be instructed to disregard the testimony, which was given by the Court. Petitioner's counsel did not ask for such admonition, but only asked for mistrial.

Counts 5, 7, 10 and 11 of the indictment, upon which petitioner was convicted, pertained to the use of credit cards, and purchases made thereby, issued in the name of Jess C. Cummings; the main evidence that petitioner posed or represented himself as Jess C. Cummings, was this testimony of William Bishop. The poisonous effect of such testimony penetrated to the jury, although the Court admonished the jury to disregard same. The 8th Circuit held the error was cured by such admonition, but failed to take cognizance that three days later, on the following Monday, said witness William Bishop was again recalled in the jury's presence. The witness again asserted his privilege against self-incrimination, this time outside the jury's presence (Tr. 404-409). This further reminder of this extremely damaging testimony was not mentioned by the Court of Appeals in its finding of no prosecutorial misconduct.

This factual situation differs markedly from **U. S. v. Hoffman**, C. A. Wisc., 1967, 385 F. 2d 501, cert. denied 390 U. S. 1031, 88 S. Ct. 1424, 20 L. Ed. 2d 288, where the witness merely gave his name and address and then asserted privilege, the prosecutor asked very few questions about where the witness was living as of a date of the arrest, and the Court properly found no prosecutorial misconduct from that simple and timely assertion of privilege. In **U. S. v. Edwards**, 366 F. 2d 853, C. A. 2, 1966, the Court only determined that the fairness of the trial was not vitiated when the Government called a witness to the stand which it in good faith believed had waived the privilege. The Court found, p. 870 ". . . no conscious and flagrant attempt to build its case out of inferences arising from use of testimonial privilege." Contrary to this, see **U. S. v. Maloney**, 262 F. 2d 535, C. A. 2, 1959, where the Government made reference to and relied on inferences from a witness' failure to testify. Assertion of Fifth Amendment privilege by a witness has been held to be

prejudicial. **Sanders v. United States**, 373 F. 2d 735, C. A. 9, 1967; **Fletcher v. United States**, 332 F. 2d 724, D. C. Cir. 1964. But see **Baker v. United States**, 389 F. 2d 629, C. A. 7, 1968.

In the case at bar, the Court of Appeals' opinion did not mention the fact that the witness Bishop waived his right against self incrimination on direct testimony, when identifying the petitioner as Jess C. Cummings. This vital fact, extremely damaging, was a matter about which this defendant had a Sixth Amendment right to extensively cross-examine. The admonition of the Court to disregard all said testimony, given of the behest of counsel for a co-defendant (who had waived cross-examination), could not have destroyed the permeating effect of same, and prosecutorial misconduct was evidenced by again parading said witness to the stand in open Court, even though no further interrogation took place in the jury's presence on said subsequent date.

That the right of cross-examination is the purpose of, and is included in the right of an accused in a criminal case to confront witnesses against him, see **Burton v. U. S.**, Mo., 1968, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476; **Barber v. Page**, C. A. Okla., 1966, 381 F. 2d 479, reversed on other grounds 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255; **Grant v. U. S.**, 368 F. 2d 658 (C. A. 5, 1966); **Dixon v. U. S.**, 333 F. 2d 348 (C. A. 5, 1964); **U. S. v. Norman**, 402 F. 2d 73, C. A. Cal., 1968.

4. The poisonous effect of identification by a witness, William Bishop, of Petitioner, in direct testimony, as a person representing himself as another who has fraudulently obtained and purchased articles on a spurious credit card issued to a "Jess C. Cummings", which said purchases were the subject of 4 Counts, and which testimony was the main basis for inferences that said Defendant

had made purchases with said credit card, remains when the Court allows witness Bishop's assertion of privilege against self incrimination, as to said identification, in cross-examination. An admonition to jury to disregard same, requested by counsel for co-defendant who did not cross-examine, could not dispel the permeation of said identification of Defendant McKuin, and denial of said Defendant's request for mistrial was prejudicial error, especially when said witness was recalled in front of the jury 3 days later, although not interrogated in their presence. Nor could the jural impression gained therefrom be effectively dispelled by the Court's instructions at a later time.

The only reason for the re-presentment of the witness Bishop before the jury (Tr. 404-409), after he had asserted testimonial privilege, and the jury admonished thereon, would be the unfair advantage gained by the Government in further reiterating, and emphasizing, the forbidden testimony. This case is a proper vehicle for delineating prosecutorial abuses.

5. The problems and inequities arising from joinder of numerous counts and numerous persons, most of whom are not defendants, is set forth in points 1 and 2 herein. The Court's instructions to disregard incompetent and non-relevant evidence, some extremely damaging, can never be effectively dispelled when the Government is allowed to parade criminal activities of six other persons before the jury trying three. The criteria of fair trial is vitiated when a majority of the evidence, and counts, pertain to others than Petitioner, or his co-defendants. This case presents an excellent vehicle for determination of joinder of counts and defendants, and the limited effect the Court's continuing instructions can possibly have.

CONCLUSION

For the reasons stated herein, we respectfully submit that the Petition should be granted.

Respectfully submitted

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CONCLUSION

For the reasons stated herein, we respectfully submit that the Petition should be granted.

Respectfully submitted

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ADDENDUM

United States Court of Appeals
For the Eighth Circuit

No. 19,681.

United States of America,
Appellee,

v.

Eldon Wayne McKuin,
Appellant.

No. 19,715.

United States of America,
Appellee,

v.

Walter Jerrold Frey,
Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

[October 16, 1970]

Before Van Oosterhout, Mehaffy and Lay, Circuit Judges

Mehaffy, Circuit Judge

After trial to a jury under a sixteen-count indictment charging a scheme of mail fraud (18 U. S. C., § 1341), defendant Eldon Wayne McKuin was convicted on thirteen

counts and defendant Walter Jerrold Frey was convicted on eleven counts.[1] Each defendant was sentenced to a term of ten years. We affirm the judgments of conviction.

The issues raised by this appeal are (1) whether there was a prejudicial misjoinder of offenses and defendants; (2) whether there was prejudicial limitation of cross-examination of the witness Walter Younge; and (3) whether there was prejudice to defendants when the witness Bishop took the Fifth Amendment which entitled them to a mistrial.

A full recitation of the salient facts is appropriate for an understanding of defendants' scheme of operation. At the time of the commission of the alleged offenses, Frey operated a marina and also the Jerry Frey Marine Sales Company in Alton, Illinois, and McKuin operated a telephone answering and secretarial service in Clayton, Missouri, a suburb of St. Louis. The general over-all scheme with which they were charged was working in concert to fraudulently obtain loans and credit cards in the names of other individuals without their knowledge or consent through the use of credit information which these individuals furnished to Frey when purchasing boats from his or through the use of information available to or obtained by the answering service. The names of the employers of these individuals were changed to companies serviced by the answering service, which verified the employment when inquiries were received. References given also included real or fictitious persons whose numbers terminated at the answering service. Callers who requested financial or employment information concerning

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[1] Mrs. McKuin (Patricia Louise McKuin) was also convicted by the jury on Counts 10 and 15 of the indictment, but the trial court suspended her sentence and placed her on probation for a period of three years. Also named in the indictment as aiders and abettors were James Leroy Robinson, James Michael Rosenthal, Walter A. Younge, Jr., George Brown, Sarah Jean Daniel and Theodore James Gallagher, Jr.

these individuals were referred to McKuin or, if he were not present, employees were instructed by McKuin to give the information contained on file cards in his office. Favorable reports were given to assure that the loan or credit would be approved. The scheme included the establishment of fictitious residences for the people whose names were used as an aid in obtaining the desired credit. The separate counts of mail fraud concern the sending of forged applications, chattel mortgages, notes, credit information, etc. through the United States mails in furtherance of this scheme to defraud and for the purpose of "obtaining money, goods, wares, merchandise and other property by means of false and fraudulent pretenses, representations and promises."

The persons in whose names loans and/or credit cards were fraudulently obtained include Kenneth Pohlmann, William A. Hoover, Jess C. Cummings, Salvatore Levantino and Frederick Clemens.

Sarah Jean Daniel testified that she lived in an apartment with James Rosenthal and James Robinson and that she was present at conferences at the apartment attended by McKuin, Frey, Bill Bishop, George Brown, Rosenthal and Robinson where they discussed plans for fraudulently obtaining credit. She learned through their conversations that McKuin's answering service would take calls concerning Cummings, Levantino and Pohlmann and confirm the information given about them on credit applications; that Jess Cummings no longer lived in St. Louis but that Frey had credit information in his office concerning him and was going to use his name; that McKuin would get information on Levantino through his answering service; that the apartment leased by Frey in the name of Kenneth Pohlmann at 965 Dauphin Lane in Florissant, a suburb of St. Louis, was for the purpose of receiving mail for him; and that the apartment at 10087 Executive Drive South, St. Ann, a suburb of St. Louis, was rented for the

purpose of receiving mail for Jess Cummings and Salvatore Levantino. She and Frey posed as Mr. and Mrs. Pohlmann when the Dauphin Lane apartment was leased and signed the lease as the Pohlmanns. She lived at 10087 Executive Drive South for about a week and took telephone calls for Cummings and also posed as his secretary when delivering a check for some furniture purchased in Cummings' name for the apartment. She also said that she went to the Boston Security Company office and signed a chattel mortgage as Mrs. Pohlmann and Rosenthal signed as Mr. Pohlmann, and that Frey, McKuin and Bill Bishop were also in on it. She was told by Rosenthal that she would have to sign or she would get knocked across the room. She was only seventeen years of age at the time and had lived in foster homes since she was fourteen months old.

In May, 1965 Kenneth Pohlmann and his wife bought a boat from Jerry Frey Marine Sales Company on a time-payment plan. Credit information was furnished to Frey and a loan was obtained from First National Bank & Trust Company of Alton, Illinois. In January, 1966 the Pohlmanns moved to Ohio. In September, 1966 a boat was purchased by McKuin and his wife, representing themselves as Mr. and Mrs. Kenneth Pohlmann, from Robert T. Smith, owner and operator of Campmarina at Osage Beach, Missouri. The boat was financed through Delta Loan & Finance Company using some of the Pohlmanns' credit references given to Frey and also names serviced by McKuin's answering service. Several payments were made in Pohlmann's name, one by S. W. McKuin with the name "Pohlmann" in parenthesis after it and several by E. W. McKuin. The balance due on the account at the date of trial was $6,815.66.

False applications in Pohlmann's name were made for credit cards from Mobil Oil Company and Central Hardware Company, using McKuin's address, 12318 Gravois

Road, on the applications. The handwriting on the applications was identified as that of Frey. The employment reference and some of the credit references were furnished as companies and individuals served by McKuin's answering service. Carte Blanche, Famous-Barr and Shell Oil Company credit cards were also obtained in Pohlmann's name using the 965 Dauphin address. These credit cards were subsequently used by McKuin and Frey for the purchase of merchandise. Famous-Barr lost a total of $2,170.97 on the Pohlmann account. The Pohlmanns testified that they did not sign nor authorize anyone else to sign their names to these documents.

William A. Hoover and his wife bought a boat from Frey in 1966 and gave him the requested credit information for obtaining financing. A loan was subsequently obtained from the Manchester Bank and secured by a note and chattel mortgage. Insurance on the boat was written for Hoover by Aetna Life & Casualty Company. Defendant Frey, using his own home address and Hoover's name, obtained another loan from the First National Bank of Alton, Illinois to finance a boat of the same description, except for the serial number which was fictitious, and took out a policy of insurance on the boat with State Farm Fire & Casualty Company, calling in the information on the telephone. Subsequently, someone representing himself as William A. Hoover called the company and reported that the boat had sunk and made a claim for insurance. The caller stated that James Rosenthal, who lived on Executive Drive, was on board at the time of the accident. The caller also said that he was presently living at 12318 Gravois, which was McKuin's address. In making its investigation the insurance company was unable to locate Mr. Hoover and denied the claim, mailing a refund of premium to Hoover's stated address, which was Frey's home address, and the card acknowledging receipt of the check was signed by Jerry Frey [illegible] check was endorsed

"William A. Hoover" and cashed, but the real William Hoover testified that he never obtained the second loan or insurance, did not file a claim, and did not receive or cash the check. Edward M. Corbett, who was with the loan department of First National Bank in Alton, testified that seven installments were paid on the loan by mail and that the bank charged off $4,292.17.

Jess C. Cummings' name was similarly used to fraudulently obtain credit. He and his wife purchased a boat from Frey in 1963, giving the required financial information. In 1966 Frey applied for a Mobil Oil Company credit card in Cummings' name, listing his address as 10087 Executive Drive South (the rented apartment) and his former address as 12318 Gravois Road (McKuin's address). He gave the name of his employer as Colgate-Palmolive Company, the number of which terminated at McKuin's answering service. Applications by Cummings for credit cards were mailed from Alton, Illinois to Sears, Roebuck and Company and Central Hardware Company. Credit cards were also obtained from Scruggs-Vandervoort's giving Kenneth Pohlmann's name as a reference, but the real Jess Cummings testified that he did not know a Kenneth Pohlmann. A washing machine was purchased from Central Hardware by someone representing herself as Mrs. Jess Cummings but later identified as Mrs. McKuin. A washing machine fitting the same description was subsequently found at the McKuin's apartment and McKuin finally paid for the machine. McKuin, posing as Jess C. Cummings, purchased a car from the Buick-Pontiac dealer in St. Charles, Missouri. William Bishop, who was in charge of car financing, said he first talked with McKuin and then turned him over to a salesman, James Moenning. Moenning also sold Bishop's wife's car to "Kenneth Pohlmann."

Salvatore Levantino had formerly lived at 965 Dauphin Lane in Florissant, a suburb of St. Louis, but had moved

to Phoenix, Arizona. His name was used to allegedly purchase a boat from Jess C. Cummings and financing in the amount of $3,600.00 was obtained from the Jefferson Gravois Bank, giving his current address as 10087 Executive Drive. Walter Younge testified that Frey signed Levantino's name and that he signed Mrs. Levantino's name. Levantino testified that he did not purchase the boat, obtain the loan, nor sign the note and mortgage, and that he never lived at the Executive Drive address. According to the vice president of the bank, the credit information on Levantino was telephone in and the note, mortgage and bill of sale on the boat were mailed to the bank. The bonding company paid part of the loss and part of it was charged off.

Also, a loan in the amount of $4,000.00 was obtained on a boat allegedly sold to one Frederick Clemens by Charles Ross, a broker for the Jerry Frey Marine Sales Company. Maurice K. Smith, who was General Manager of Allied Concord Finance Corporation in 1966, testified that the company received credit references and other information concerning Clemens from Frey over the telephone. Smith requested Frey to furnish a survey report and note which were sent to him through the mail. Joseph Sherlock, Jr., a salesman for Frey, testified that his name on the survey report was forged. A check was issued to Jerry Frey Marine Sales & Service for $4,000.00 and endorsed by Frey. When the loan was not paid and an attempt was made to locate the maker, it was discovered that the answering service had verified Clemens' employment at Allied Chemical Corporation, which was untrue. Walter Younge allegedly brought the man in to purchase the boat and received a commission, but the real "Fred Clemons" who was a friend of Younge's testified that he did not purchase a boat and had never worked for Allied Chemical Corporation. The serial number given was a

fictitious number. Apparently, the loan was obtained on a nonexistent boat, and the lender lost most of the money.

We find no merit to defendants' contention that there was prejudicial misjoinder of offenses and defendants and that the court abused its discretion in denying defendants' motion for severance.

Fed. R. Crim. P. 8 (a) provides for joinder of offenses where the crimes are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Paragraph (b) of said rule further provides that "two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses" and that "such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

It is clear from the evidence that McKuin and Frey devised and intended to devise one over-all scheme to defraud and cooperated and worked in concert in violation of the statute. See *Pritchard v. United States*, 386 F. 2d 760, 764 (8th Cir. 1967), *cert. denied*, 390 U. S. 1004 (1968). A handwriting expert, George H. Vollertsen, testified that the applications for credit cards were in the handwriting of Frey. On the other hand, McKuin, through his answering service, was instrumental in obtaining credit approval by the giving of fictitious information concerning the applicants. It matters not that the credit cards were used separately by McKuin and Frey and that they obtained separate loans through the use of the over-all scheme or plan. These transactions were carried on and made possible by the use of the over-all scheme, each assisting in and making it possible for the other to fraudulently obtain the money or merchandise.

This case is readily distinguishable from the case of *Kotteakos v. United States*, 328 U. S. 750 (1946), relied upon by defendants, where the Court held that the indictment was duplicitous in that the proof showed a multiplicity of schemes rather than a single scheme. In *Kotteakos*; fraudulent loans were obtained by a broker for various individuals. The Court found that there were actually eight or more different conspiracies, none of the participants of the individual conspiracies having any knowledge of the other conspiracy except the broker. The Court therefore found that it was prejudicial error to try all of the participants in the individual conspiracies at one time. In *Blumenthal v. United States*, 332 U. S. 539 (1947), the Court, in distinguishing *Kotteakos*, said at pp. 558-559:

> "The case therefore is very different from the facts admitted to exist in the *Kotteakos* case. . . [N]one aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.
>
> "Here the contrary is true. All knew of and joined in the overriding scheme."

The same reasoning is applicable to the facts here.

In the recent case of *United States v. Sheehan*, 428 F. 2d 67 (8th Cir. 1970), we affirmed the convictions of the defendants under an indictment charging the use of the United States mails in the fraudulent sale of hearing aids in violation of 18 U. S. C., § 1341. It was there contended that the evidence showed that each defendant and each salesman operated separate from a common scheme to

defraud which constituted a fatal variance in the indictment alleging a single scheme, but we disagreed. In support of our holding that there was one over-all scheme to defraud, even though defendants were not always associated with the same company at the same time, we quoted from *Friedman v. United States*, 347 F. 2d 697, 708 (8th Cir. 1965), as follows (428 F. 2d at 76):

> "'We think it well established that there was one overall scheme to defraud and that this overall scheme encompassed both the Minneapolis and St. Paul studios. It was not essential to a determination of guilt herein that Lowery should have been instrumental in each operation or in the operation out of the St. Paul Studios. While Lowery's activities could have been limited to the Minneapolis studio, the jury could well have found, as they undoubtedly did find, that he was aware of what was going on in the St. Paul studios also. In a somewhat similar situation, this court recently said in Koolish v. United States, 8 Cir., 1965, 340 F. 2d 513, 525, certiorari denied, 85 S. Ct. 1805:
>
> "'"We are fully satisfied from an examination of the tremendous record here that substantial evidence supports the jury finding that there was an overall conspiracy to defraud and to obtain money and property from the Kenny Foundation and its donors, that each of the appellants cooperated with the others and each knowingly joined in the conspiracy, and that use of the mails to defraud was established in furtherance of the overall objective. It is immaterial whether or not there were minor conspiracies or schemes inside the overall conspiracy to obtain money from the Kenny Foundation and its contributors through false and fraudulent pretenses, representations and promises and that some of the defendants participated in some of these inner or smaller schemes but not in all of them."'"

It is thus immaterial to the proof of an over-all scheme that separate purchases were made and loans obtained by McKuin and Frey within the framework of the common plan. All of the cases relied upon by defendants are factually dissimilar.

We said in *Johnson v. United States*, 356 F. 2d 680, 682 (8th Cir. 1966), that under Rule 8 (a), Fed. R. Crim. P., joinder of offenses is ordinarily appropriate where, as here, the specific counts refer to the same type of offenses occurring over a relatively short period of time, and the evidence as to each count of necessity overlaps. Furthermore, under Rule 14, Fed. R. Crim. P., it is well settled that the trial court has a wide range of discretion in granting separate trials on different offenses and for different defendants, and in order to secure a reversal it must be affirmatively shown that prejudice resulted from the failure to grant separate trials. *Fisher v. United States*, 324 F. 2d 775, 780-781 (8th Cir. 1963). To the same effect, see *United States v. Christian*, 427 F. 2d 1299 (8th Cir. 1970). *Cf. Gresham v. United States*, 374 F. 2d 389, 390 (8th Cir. 1967).

The court properly determined that the joinder of offenses and that the joinder of defendants were proper under Rule 8 and the court did not abuse its discretion in determining that the defendants had not demonstrated that they were entitled to relief from prejudicial joinder under Rule 14. The defendants have likewise failed to prove a fatal variance between the allegations of the indictment and the proof.

Also without merit is defendants' next contention that it was reversible error for the court to sustain defendants' objection to the question asked Robert Davis, an employee of Frey's, on cross-examination, whether there came a time when he was instructed by Frey not to give any further credit to Walter Younge. The court sustained

the objection on the ground that the question was immaterial. On direct examination Davis had merely testified that he had worked for Frey for three or four years and had identified his handwriting. Frey contends on appeal (although he did not mention it at the time the objection was made) that he was attempting to show a cause for Younge to be biased against Frey and that Davis should have been permitted to answer the question. Davis did testify that Younge did not come around the marina in July and August, 1966, and Donald Hull, a salesman for Frey, was called by the defendants and testified that Frey did not want Younge around there and that they tried to discourage him by cutting the water line off to his boat, cutting his electricity off, running him out of the harbor, and doing everything they could to get rid of him. Any testimony which Davis might have given concerning Younge's credit having been cut off by Frey would have been merely cumulative to the other evidence. We agree with the principle enunciated in the cases cited by defendants that considerable latitude should be granted on cross-examination but we perceive no way in which defendants could have been prejudiced by the court's ruling and find no abuse of discretion.

Finally, the court did not err in refusing to grant a mistrial when the witness William Bishop refused to answer certain questions under his Fifth Amendment privilege. Bishop was called by the government and asked to identify the person who signed the name "Jess C. Cummings" to certain papers in connection with the purchase and financing of a car. Bishop was a salesman in charge of financing at Ken Bender Buick-Pontiac Inc. in St. Charles, Missouri in 1966 when a car was sold to Cummings and a loan obtained to finance it. Bishop stated on the witness stand that the man representing himself as Cummings was Wayne McKuin but that he turned him over to another salesman and did not recall who signed

the papers and was not sure whether he saw them signed. The court asked the jury to leave the room and warned Bishop that other witnesses had testified concerning his involvement in the case and, in effect, warned him that he had better tell the truth. Thereafter, Bishop took the Fifth Amendment when he was asked whether he took the credit information for the financing of the car sold to Cummings and whether he sold an automobile to Kenneth Pohlmann. On cross-examination he refused to answer when asked whether he had been unemployed since June, 1968 and also refused to say whether he knew a phony or fictitious name was being used at the time the automobile was purchased by Pohlmann.

Subsequently, defense counsel asked that a mistrial be granted on the ground that Bishop's taking the Fifth Amendment was prejudicial to defendants. Counsel also stated that the prosecution must have known that he would take the Fifth Amendment and led him on until he did. The court overruled the motion, commenting as follows:

> "If you recall, during the examination I sent the jury out and talked to him about his statement, and at that time I asked for the paper, statement, which he hadn't made, but which had been made by Mr. Rudy, and which you gentlemen have seen, and I think the answer to the question that you gentlemen asked him on which he took the Fifth, in my opinion, shows that he gave them the information about that."

Then the court asked the government's attorney if he had any information that Bishop was going to take the Fifth and he said he did not—that it came as a complete surprise to him. The court overruled the motion on the basis that the questions which Bishop refused to answer were answered in the statement made by him to the postal inspector, Rudy, and on the further basis that the government's attorney had no idea that he would take the Fifth

Amendment. The court then instructed the jury as follows:

> "Ladies and gentlemen of the jury, during the time that the witness Bishop was on the stand, William Bishop, which was the witness ahead of Mr. Bahlinger, who is on the stand now, in reply to some questions, and I won't undertake to tell you the number because your recollection will govern that, that he did not answer on the basis of the Fifth Amendment.
> "You are not to consider that in any way with respect to this case. Just strike that answer out of your mind entirely. It's not to be considered by you in arriving at your verdict in any respect, but insofar as it is humanly possible to treat it as if you had never heard it, wipe it out of your mind."

Defendant admits that there is substantial authority that the assertion of the Fifth Amendment privilege by a witness under the circumstances presented here is not reversible error. In *Namet v. United States*, 373 U. S. 179, 186-187 (1963), the Court said:

> "None of the several decisions dealing with this question suggests that reversible error is invariably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error. First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not

subject to cross-examination, and thus unfairly prejudiced the defendant. . . . On the other hand, courts have failed to find reversible error when such episodes were 'no more than minor lapses through a long trial.' (Citing cases.) And even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error."

See also and compare *United States v. Edwards*, 366 F. 2d 853, 870 (2d Cir. 1966).

Defendants rely on the second theory that the refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination. We agree with the district judge, however, that critical weight was not added to the prosecution's case and that no prosecutorial misconduct occurred. Furthermore, any possible prejudicial error was cured by the court's instructions. *Namet v. United States, supra.*

Finding no error, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 970

WALTER JERROLD FREY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 974

ELDON WAYNE MCKUIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were tried before a jury in the United States District Court for the Eastern District of Missouri and were found guilty of conspiracy and

mail fraud (18 U.S.C. 371, 1341 and 1342).[1] Each was sentenced to a term of ten years. The court of appeals affirmed in an opinion which recounts the evidence and discusses the issues in careful detail (Frey Pet. A-1 to A-8).

The substance of the scheme was that petitioner Frey, who operated a marine sales company, would get credit information from patrons of his establishment and would thereafter use their names in obtaining credit for persons who would falsely adopt those names. The names of the employers of the former patrons would be changed to names serviced by petitioner McKuin's telephone answering service. As a result, when a bank sought to verify this credit information, it would reach McKuin or his employees; they would give the necessary verification and the credit would be extended. Some of petitioners' employees aided and abetted this scheme upon occasion by impersonating the individuals seeking credit. By this means petitioners obtained credit cards they used separately to obtain quantities of merchandise.

1. Both petitioners urge that the indictment was duplicitous in that the proof showed a multiplicity of schemes rather than a single plan. The contention is not one of law, however, but an argument as to how the facts of this case ought to be characterized. As the court of appeals concluded after careful analy-

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[1] Frey was convicted on eleven counts of the 16-count indictment, McKuin on thirteen. The wife of McKuin was also a defendant and was convicted on two counts, her sentence being suspended. Six other persons were named in the indictment as aiders and abetters, but not as defendants.

sis, the evidence showed a single, comprehensive scheme within whose framework the various purchases were made and the loans obtained. This constituted a single conspiracy. *Blumenthal* v. *United States*, 332 U.S. 539, 558-559. The fact that the various members of a conspiracy may play different roles in executing it, and have dissimilar motives for participating therein, does not mean that a single conspiracy does not exist. Since the scheme was singular, it was proper to try both petitioners together.

2. McKuin urges that the trial court's rulings during the testimony of government witness Bishop were unfair to him. Bishop, an automobile salesman, testified that he was involved in selling a car to a person representing himself as Jess C. Cummings, who in fact was petitioner McKuin (Tr. 375-378). The United States Attorney asked whether Bishop saw McKuin sign certain papers. After the witness said he could not recall who signed the papers, the court excused the jury and warned Bishop to answer the questions (Tr. 378-382). After the jury returned, the witness refused on grounds of self-incrimination to state whether he took the credit information on this sale and also whether he sold a car to a Kenneth Pohlmann. The objections were sustained (Tr. 382-383). The witness then answered other questions (Tr. 383-385). On cross-examination by McKuin's counsel, Bishop refused to answer, on grounds of possible self-incrimination, questions whether he knew the name Pohlmann was fictitious and whether he was unemployed (Tr. 388, 390).

Subsequently McKuin asked for a mistrial because Bishop had refused to answer questions on Fifth Amendment grounds. He argued that the prosecution must have known that Bishop intended to do so, but the United States Attorney said that the refusal of the witness to answer came as a complete surprise to him. The court, noting that the witness had answered the question in a statement to a postal inspector, expressed confidence that the prosecutor had no idea that the witness was going to refuse and denied the motion (Tr. 394-396). Counsel for Frey, who had joined in the motion, asked the court to instruct the jury to disregard the refusal of Bishop to testify on Fifth Amendment grounds and the court so instructed (Tr. 396-397).[2]

McKuin urges that he was prejudiced not only by the witness' claim of the Fifth Amendment, but also by the court's instruction to disregard the occurrence, which, he claims, precluded cross-examination. McKuin's counsel made no objection to the court's instruction, as co-counsel had requested, that the jury should disregard the claim of privilege, and he did not seek at any point to ask further questions on cross-examination. There is no rational ground for assertion that the "witness' refusal to answer added critical weight to the prosecution's case in a form

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[2] The government subsequently moved to recall the witness, who had said he wished to clarify some matters. The court, however, first sought to ascertain whether the witness still wished to claim the privilege. When the witness said he did, the court refused to permit him to testify (Tr. 404-409).

not subject to cross-examination". *Namet* v. *United States*, 373 U.S. 179, 186-187.

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Solicitor General.

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